

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer
Philip D. Moeller, and Jon Wellinghoff.

Milford Power Company, LLC
Morgan Stanley & Company Incorporated

Docket No. EC07-13-001

ORDER GRANTING CLARIFICATION

(Issued August 1, 2007)

1. On May 15, 2007, under Rule 212 of the Commission's Rules of Practice and Procedure,¹ Milford Power Company, LLC's (Milford Power) filed a motion for clarification of the Commission's February 12, 2007 Order. As relevant here, that order granted, subject to conditions, an application by Milford Power and Morgan Stanley & Company Incorporated (collectively, Applicants) under sections 203(a)(1) and (a)(2) of the Federal Power Act (FPA)² for blanket authorization for certain transfers and acquisitions of Class A Membership interests in Milford Holdings LLC (Milford Holdings), which is Milford Power's parent company.³ In this order, we grant Milford Power's motion for clarification.

Background

2. The February 12 Order granted Applicants' request for a two-year blanket authorization for future transfers of Class A membership interests in Milford Holdings if

¹ 18 C.F.R. § 385.212 (2007).

² 16 U.S.C.A. § 824b (West Supp. 2006).

³ *Milford Power Company, LLC and Morgan Stanley & Company Incorporated*, 118 FERC ¶ 61,093 (2007) (February 12 Order).

the acquiring party is a bank, institutional investor, financial institution, investment company, investment fund or related entity that:

(a) is not primarily engaged in energy-related business activities and is not affiliated with a traditional utility with captive customers;

(b) does not individually, or together with its affiliates, own 5 percent or more of the voting interests in any public utility that has interests in any generating facilities or otherwise engages in jurisdictional activities within the ISO New England, Inc. (ISO-NE) market; and

(c) individually, or together with its affiliates, will hold 20 percent or less of Milford Holdings' Class A Membership Interests.

3. Milford Power's motion for clarification concerns the February 12 Order's condition that an acquiring entity "does not individually, or together with its affiliates, own 5 percent or more of the voting interests in any public utility that has interests in any generating facilities or otherwise engages in jurisdictional activities within the [ISO-NE] market." It now states that some of the entities that may seek to acquire interests under the blanket authorization may be affiliated with power marketers where such affiliated power marketers (a) may buy and sell power in the ISO-NE market but (b) do not own or control generation or transmission facilities in the ISO-NE market. Milford Power now requests that the Commission clarify that such acquiring entities are not restricted from acquiring Class A membership interests in Milford Holdings under the two-year blanket authorization so long as they otherwise meet its requirements.

4. Milford Power notes that the Commission has held that "[w]ithout control of capacity, whether through ownership of physical assets or through power purchase agreements, sellers cannot harm competition in wholesale energy markets."⁴ It states that its requested clarification is limited to power marketers that do not own or control any generation or transmission facilities in ISO-NE and is, therefore, consistent with *Duke Energy*. Moreover, Milford Power points out that the Commission granted the same clarification in another case, *Entegra I*.⁵ Milford Power notes that the Commission extended its holding in *Entegra I* to apply to all current and potential investors in Entegra,

⁴ It cites *Duke Energy Corp.*, 113 FERC ¶ 61,297, at P 73 (2005) (*Duke Energy*).

⁵ *Entegra Power Group, LLC*, 117 FERC ¶ 61,085, at P 20 (2006) (*Entegra I*). Milford Power also cites *Morgan Stanley & Company, Inc.*, 117 FERC ¶ 61,111, at P 27 (2006) (*Morgan Stanley*) (same).

not just specifically named entities.⁶ That order states that any entity owning five percent or more of a public utility owning or controlling transmission in ISO-NE has to be engaging in jurisdictional activities within the ISO-NE market. Consequently, an acquisition of Class A membership interests in Milford Holdings by such an entity would not be covered by Milford Power's blanket authorization. Milford Power states that its requested clarification is consistent with *Entegra II*.⁷

5. Milford Power states that it served copies of its motion for clarification on the service list for Docket No. EC07-13-000. No responses were filed.

Discussion

6. In *Duke Energy*, the Commission determined that:

Without control of capacity, whether through ownership of physical assets or through power purchase agreements, sellers cannot harm competition in wholesale energy markets. . . . [T]he mere presence of a large power marketing operation, *per se*, does not, in itself, confer any additional market power . . . on the merged firm, or on any other seller in the relevant market.[⁸]

7. In *Entegra I*, the Commission applied the same principle regarding the applicants (*i.e.*, the acquiring entities) that were affiliated with identified power marketers who would not own or control generation, or own, control or operate any electric transmission in the relevant control areas. We found that the affiliation of such entities with such power marketers did not present competition concerns and did not interpret the restriction of less than five percent of a public utility that engages in jurisdictional activities to apply to the applicants' affiliation with such power marketers.⁹

8. In *Entegra II*, the Commission clarified that its blanket authorization in *Entegra I* was not limited to the acquiring entity in that case, but also applies to all other future or current owners of Entegra that otherwise meet the criteria of the original blanket

⁶ *Entegra Power Group, LLC*, 118 FERC ¶ 61,181, at P 15 (2007) (*Entegra II*).

⁷ Milford Power's Motion for Clarification at 5-6.

⁸ *Duke Energy*, 113 FERC ¶ 61,297 at P 73 (emphasis in original).

⁹ 117 FERC ¶ 61,085 at P 19-20. *See also Morgan Stanley*, 117 FERC ¶ 61,111 at P 27 (same).

authorization. We also required that the affiliated power marketer not own or control generation *or transmission* facilities. This ensures that transactions under the blanket authorization will not affect competition.¹⁰

9. Therefore, regarding the condition of the blanket authorization granted in the February 12 Order at issue here, we clarify that the blanket authorization applies if the acquiring party is a bank, institutional investor, financial institution, investment company, investment fund or related entity that does not individually or collectively with affiliates own five percent or more of the voting interests in any public utility that has interests in any generating facilities or that engages in jurisdictional activities within the ISO-NE control area, provided that such restriction on jurisdictional activities does not apply to a power marketing affiliate that does not own or control generation or transmission facilities.

The Commission orders:

Milford Power's motion for clarification of the February 12 Order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁰ *Entegra II*, 118 FERC ¶ 61,181 at P 17. *See also Boston Generating, LLC*, 119 FERC ¶ 61,147, at P 16-18 (2007) (granting a request for a general power marketer exception to the restriction of less than five percent of a public utility that engages in jurisdictional activities, provided that the affiliated power marketer does not own or control generation or transmission facilities).